

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JAMES D. OFELDT,  
 #81842

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

3:10-cv-00420-LRH-VPC

**ORDER**

On October 8, 2010, the court dismissed with prejudice this *pro se* civil rights action (docket #9). Judgment was entered on October 12, 2010 (docket #11). Before the court is plaintiff's motion to vacate erroneous order (docket #13). Also before the court is defendant's bill of costs (docket #12) and plaintiff's motion to vacate bill of costs (docket #14).

With respect to plaintiff's motion to vacate order, where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which

1 it is based has been reversed or otherwise vacated, or it is no longer equitable that the  
 2 judgment should have prospective application; or (6) any other reason justifying relief  
 from the operation of the judgment.

3 Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick Garin*  
 4 *Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider, a party  
 5 must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior  
 6 decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986),  
 7 *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9<sup>th</sup> Cir. 1987). Rule 59(e) of the Federal  
 8 Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be filed no later  
 9 than 10 days after entry of the judgment." Further, a motion under Fed. R. Civ. P. 59(e) "should not be  
 10 granted, absent highly unusual circumstances, unless the district court is presented with newly  
 11 discovered evidence, committed clear error, or if there is an intervening change in the controlling law."  
 12 *Herbst v. Cook*, 260 F.3d 1039, 1044 (9<sup>th</sup> Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253,  
 13 1255 (9<sup>th</sup> Cir. 1999).

14 In the order of October 8, 2010, the court dismissed the complaint, which alleged that Ely State  
 15 Prison's policy regarding reading material in disciplinary segregation violated plaintiff's First and  
 16 Fourteenth Amendment rights (docket #9). In his motion for reconsideration, plaintiff alleges many  
 17 facts outside of the complaint. The court may not consider new allegations or claims (absent newly  
 18 discovered evidence) in a motion for reconsideration. Plaintiff has failed to make an adequate showing  
 19 under either Rule 60(b) or 59(e) that this court's order dismissing the action should be reversed.  
 20 Accordingly, his motion to vacate order is denied.

21 Next, defendants filed a bill of costs (docket #12) as the prevailing party and plaintiff has filed  
 22 a motion to vacate bill of costs (docket #14). Defendants seek the \$350 fee for filing the petition for  
 23 removal of a state action to federal court. In his motion, plaintiff objects on the basis that he filed this  
 24 action in state court, where he was granted *in forma pauperis* status, and the attorney general voluntarily  
 25 removed the action to federal court, incurring the \$350 fee.

26 While Federal Rule of Civil Procedure 54(d)(1) establishes a rebuttable presumption that the  
 27 prevailing party will be awarded its taxable costs, it also vests discretion in the district court to refuse  
 28 to do so. *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 591 (9<sup>th</sup> Cir. 2000) (en banc). A

1 district court must specify its reasons for its refusal to award costs. *Id.*

2 A prevailing party is entitled to recover costs even in the case of indigent prisoner litigants who  
3 have been granted leave to proceed *in forma pauperis*. *Monroe v. U.S. Marshals*, 101 F.3d 706, 1996  
4 WL 665147 \*2 (9<sup>th</sup> Cir. 1996). However, in a civil rights action, consideration of a plaintiff's limited  
5 resources is an appropriate reason for denial of costs. *Ass'n of Mexican-Am. Educators*, 231 F.3d at  
6 593; *see also Tubbs v. Sacramento County Jail*, 258 F.R.D. 657, 661 (E.D. Cal. 2009). Additionally,  
7 "imposing costs on losing civil rights plaintiffs of modest means may chill civil rights litigation."  
8 *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9<sup>th</sup> Cir. 1999); *see also Tubbs*, 258 F.R.D. at 661.

9 The court takes judicial notice of plaintiff's limited resources as demonstrated in his application  
10 to proceed *in forma pauperis* with respect to a *habeas corpus* petition (*Ofeldt v. Director, NDOC*, 3:10-  
11 cv-00646-LRH-VPC), and based on such limited resources, combined with the possibility that the  
12 imposition of the award would have a chilling effect on civil rights litigants, an award of costs against  
13 plaintiff would be inequitable.

14 **IT IS THEREFORE ORDERED** that plaintiff's "motion to vacate erroneous Order and  
15 judgment per FRCP 59(e)" (docket #13) is **DENIED**.

16 **IT IS FURTHER ORDERED** that plaintiff's motion to vacate bill of costs (docket #14) is  
17 **GRANTED**.

18 **IT IS FURTHER ORDERED** that defendants' bill of costs (docket #12) is **DENIED**.

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20 Dated this 5th day of November, 2010.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE